Nik Mohd Yusof bin Nik Ismail (suing on behalf of Persatuan Pemilik dan Penduduk Serendah Golf Resort) v Majlis Daerah Hulu Selangor

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO MT1–21–129 OF 2001
SURIYADI J
1 MARCH 2005

Civil Procedure — Appeal — Notice of — Notice not in accordance with form — Effect of defect

Civil Procedure — Jurisdiction — Registrar — Jurisdiction of registrar to hear application for declaration

The plaintiff had taken up this representative action on behalf of a society. The defendant was a local council and had issued separate notices of assessment against the plaintiff and the society pursuant to ss 141 and 142 of the Local Government Act 1976 ('the Act').

The plaintiff was dissatisfied with the assessment made by the defendant and held the view that the notices were issued pursuant to a wrong provision of the Act. The plaintiff filed this action against the defendant and prayed, amongst others, for a declaration that the notices of assessment issued by the defendant to the plaintiff be declared null and void.

The summons and the statement of claim were served on the defendant but the defendant did not file its statement of defence. As no defence was filed, the plaintiff applied, in encl 3, for leave to obtain default judgment against the defendant. Thereafter, the defendant applied, vide encl 5, for an extension of time to file its statement of defence.

Encls 3 and 5 were heard simultaneously. The senior assistant registrar ('SAR') dismissed the defendant's application and allowed the plaintiff's application to enter default judgment against the defendant.

This was the defendant's appeal.

Held, dismissing the appeal:

(1) Section 41 of the Specific Relief Act 1950 stipulated that the court may make a declaratory order. Based on O 1 r 4(2) of the Rules of the High Court 1980, 'court' was defined as 'the High Court or any one or more judges thereof … or the registrar'. As the term 'court' also included the registrar, the registrar thus statutorily and legally had the jurisdiction to decide on the present matters (see para 15).

(2) As such, an application to obtain a default judgment may be undertaken in chambers and heard by the registrar and no mistake had been

committed by the senior assistant registrar here for want of jurisdiction (see para 17).

(3) Two applications were heard by the registrar, namely encls 3 and 5, but in the defendant's notice of appeal, no mention was made of the dismissal of encl 5. Further, the defendant's notice of appeal did not carry the signature of the registrar, the date when it was signed, the date of the hearing before the judge-in-chambers and the seal. As such, it was still a mere draft notice of appeal when it was served on the plaintiff (see para 26).

[**Bahasa Malaysia summary**

Plaintif telah mengambil tindakan representasi ini bagi pihak sebuah persatuan. Defendan yang merupakan sebuah majlis tempatan telah mengeluarkan notis taksiran yang berlainan kepada plaintif dan persatuan tersebut menurut ss 141 dan 142 Akta Kerajaan Tempatan 1976 ('Akta tersebut').

Plaintif tidak berpuas hati dengan taksiran yang dikeluarkan oleh defendan dan berpendapat bahawa notis-notis tersebut dikeluarkan menurut peruntukan Akta tersebut yang salah. Plaintif memfailkan tindakan ini terhadap defendan dan memohon, antara lain, untuk deklarasi bahawa notis-notis taksiran yang dikeluarkan oleh defendan kepada plaintif diisytiharkan tidak sah.

Saman serta pernyataan tuntutan plaintif telah disampaikan ke atas defendan tetapi defendan tidak memfailkan pernyataan pembelaan mereka. Oleh kerana tiada pembelaan difailkan, plaintif telah memohon, di dalam lampiran 3, untuk meminta kebenaran bagi mendapatkan penghakiman ingkar terhadap defendan. Kemudian, defendan telah memohon, melalui lampiran 5, untuk lanjutan masa bagi memfailkan pernyataan pembelaan mereka.

Lampiran 3 dan 5 didengar bersama. Penolong kanan pendaftar telah menolak permohonan defendan dan membenarkan permohonan plaintif untuk memasuki penghakiman ingkar terhadap defendan.

Ini merupakan rayuan defendan.

Diputuskan, menolak rayuan tersebut:

(1) Seksyen 41 Akta Pelaksanaan Spesifik 1950 menetapkan bahawa mahkamah boleh membuat perintah perisytiharan. Menurut O 1 r 4(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), 'court' ditakrifkan sebagai 'the High Court or any one or more judges thereof … or the registrar'. Oleh kerana istilah 'court' turut termasuk pendaftar, pendaftar mempunyai bidang kuasa sah dan statutori untuk memutuskan perkara semasa ini (lihat perenggan 15).

(2) Oleh itu, permohonan untuk mendapatkan penghakiman ingkar boleh dibuat di dalam kamar serta didengar oleh pendaftar dan pendaftar di dalam kes ini tidak melakukan kesilapan atas sebab tiada bidang kuasa (lihat perenggan 17).

(3) Dua permohonan telah didengar oleh pendaftar tersebut, iaitu lampiran 3 dan 5, tetapi di dalam notis rayuan defendan, penolakan lampiran 5 tidak dirujuk secara khusus. Tambahan pula, notis rayuan defendan tidak mempunyai tandatangan pendaftar, tarikh pendaftar menurunkan tandatangan dan tarikh perbicaraan di hadapan hakim dalam kamar serta meterai tersebut. Oleh itu, notis rayuan tersebut hanya merupakan draf notis rayuan semasa notis tersebut diserahkan kepada plaintiff (lihat perenggan 26).]

Notes

For cases on notice of appeal, see 2(1) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1095–1100.

For cases on jurisdiction of registrar, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 723–724.

Cases referred to

Chan Sang & Anor v Golden Century Development Sdn Bhd & Anor [1995] 1 MLJ 92 (refd)

Evans v Bartiam [1937] AC 473 (refd)

Hwang Ju-in v Huang Han Chao [1977] 2 MLJ 229 (refd)

Lau Yeok Lin & Ors v Hip Soon Engineering & Construction Sdn Bhd [1988] 2 MLJ 308 (refd)

Low Kum Yoon v Teh Kim Huah [1979] 1 MLJ 83 (refd)

Vine v National Dock Labour Board [1956] 1 All ER 1 (refd)

Legislation referred to

Courts of Judicature Act 1964

Local Government Act 1976 ss 127, 141, 142

Rules of the High Court 1980 O 1 r 4(2), O 14 r 1, O 18 r 2, O 19 r 7, O 32 r 9, O 56, O 73 r 5, 7(1), O 81, O 81 r 1

Specific Relief Act 1950 ss 41, 44, 45, 46, 47, 48, 49

Suria Kumar (Suria Kumar & Co) for the plainttiff.

R Pathmanathan (Pathmanathan Ram & Associates) for the defendant.

Suriyadi J:

[1] The plaintiff had taken up this representative action in the High Court of Malaya at Shah Alam on behalf of the Persatuan Pemilik dan Penduduk

Serendah Golf Resort (hereinafter referred to as the society) against the defendant. The defendant is the Majlis Daerah Tempatan and was set up under the Akta Kerajaan Tempatan 1976 (hereinafter referred to as the Act). Pursuant to s 127 of the Act the defendant is empowered to levy yearly assessment rates on property in that particular district.

[2] On or about the month of September 1994, the defendant for the first time had issued separate notices of assessment dated 6 September 1994 against the plaintiff and the society pursuant to ss 141 and 142 of the Act (hereinafter referral is only made to the plaintiff's assessment, it being a representative action). The plaintiff was dissatisfied with the assessment, and had held the view that it was issued pursuant to a wrong provision of the Act, whereupon as a consequence of that mistake errors had been made as regards the amount.

[3] As a follow up to that held view this civil suit was filed on 9 August 2001. The plaintiff had prayed, amongst others that the impugned notice of 6 September 1994 be declared null and void and be set aside, and the rate assessed by the defendant against the plaintiff also be declared null and void. Before delving in detail as to the substantive matter of this case, it is worthy to notice that the action taken up by the plaintiff, though praying for a few declaratory orders had proceeded vide a writ action. Bearing in mind the status of the defendant, it was not surprising that the plaintiffs had adhered to the requirements of the Chief Justice whereby the action was filed under Code 21, and in this format.

[4] Pursuant to O 18 r 2 of the Rules of the High Court 1980, generally a defendant who enters an appearance in, and intends to defend an action must, unless the court gives leave to the contrary, serve a defence on the plaintiff before the expiration of 14 days after the time limited for appearing or after the statement of claim has been served on him, whichever is the later. The summons and statement of claim (encl 1) were indeed served on the defendant on 2 October 2001, and on 17 October 2001 the defendant's solicitors had entered appearance. Regretfully until now the defendant has yet to file its statement of defence.

[5] Mercifully for the defendant, O 73 r 7(1) provides that except with the leave of the court, no judgment in default of appearance or pleading, to include defence, shall be entered against the Government in civil proceedings. This provision does not promulgate that a blanket bar exists whereby no default judgment may be obtained against the Government in whatever situation in civil proceedings. In fact, it is crystal clear that so long as leave has been obtained ie after a proper exercise of the powers has been undertaken by the court, then that order may be meted out. As no defence was filed here, the plaintiff on 25 January 2002 had filed a summons in chambers (encl 3) to be heard on 14 May 2002 for leave, purposefully to

obtain a default judgment. In other words the plaintiffs had done everything that was required by law before proceeding with encl 3. The rest was up to the court.

[6] The summons in chambers of the plaintiff was supported by an affidavit, which supplied the necessary supporting grounds. It was bad enough that the defendant did not file the defence in the main suit, but that nonchalant attitude reared itself again when it did not file the necessary affidavit-in-reply. As there was no rebuttal evidence to counter the supporting affidavit of the plaintiff's application (encl 3), the defendant therefore was deemed to admit the truth of that application's affidavit. Without the defence the defendant was also deemed to submit to the statement of claim.

[7] From the documentation made available in the court file, and confirmed by the defendant, it had also filed a summons-in-chambers sometime on 6 May 2002 to be heard on 13 June 2002. The latter, marked as encl 5, contained an application by the defendant for an abridgment/ extention of time to enable it to file the necessary statement of defence. Attached to that application was a draft copy of the intended statement of defence. Despite the relevancy and existence of that pending application of extention of time (encl 5), the senior assistant registrar still proceeded to hear the plaintiff's application for judgment in default of defence (encl 3), as stated above.

[8] On that date when encl 3 was being heard, for some rhyme or reason there was no murmur of dissension by the defendant to object to encl 5 being heard simultaneously. It must be emphasised in no uncertain terms that on that relevant date, both the plaintiff and defendant's solicitors were present, and no one had made any suggestion to postpone the hearing of encl 3, on account of encl 5. On reflection, the defendant could not be said to have been prejudiced by the simultaneous handling of encls 3 and 5 by the senior assistant registrar, as everyone relevant was present and matters could be disposed of promptly and efficiently. On that premise the simultaneous handling of those applications by the senior assistant registrar was proper and beyond criticism. Being a one-sided affair, be it as regards encl 3 or the substantive action, for the senior assistant registrar to deny the judgment in default application would have been unthinkable hence the default judgment. On that hearing date the defendant was not too lucky as the extention application (encl 5) was also dismissed. The defendant subsequently filed an appeal hence this hearing.

[9] In the course of the hearing I had enquired from the defendant's counsel his main ground of his appeal, and his answer was simple ie the senior assistant registrar had no locus or authority to give that 'judgment in default' order. The defendant ventilated that as the matter in contention was a declaratory matter, whereby only a High Court judge in person had the

authority to deal with it, any judgment in default order must by necessity also originate from the latter. Putting it in another way, as the senior assistant registrar was disqualified from hearing a full blown declaratory application, it also meant that he was precluded from adjudging a judgment in default application.

[10] I will attempt to resolve the correctness or incorrectness of this view by slow progression, starting with the appreciation of the prayers sought by the plaintiff (s 41 of the Specific Relief Act 1950). Generally, applications for declarations are brought before the court through originating summons, though not in this case, which as stated above has followed the route of a writ. Regardless of the format alluded to in this action the power to make any declaratory judgment is a discretionary one. It must be exercised with care and caution, granted sparingly and judicially, and must take into consideration all the circumstances of the case (*Low Kum Yoon v Teh Kim Huah* [1979] 1 MLJ 83; *Vine v National Dock Labour Board* [1956] 1 All ER 1).

[11] It has been the practice of the High Court that declaratory decrees be made by a judge in person and not by any registrar. Interestingly, under s 41 of the Specific Relief Act 1950, if any person wishes such a decree he may institute that relevant suit, and the court may make the necessary order. The giver of that order is 'the court but a scrutiny of this relevant Act fails to supply and define its exact meaning. There must be a vast difference between the terminology of 'court and 'judge' as, for example under Chapter VIII especially from ss 44 to 49, the terminology 'judge' has consistently been adverted to and not 'court'. Without delving in depth, the terminology of 'judge' here must mean the High Court judge in person, regardless of whether the hearing of the case was in open court or in chambers, but certainly does not include the registrar.

[12] Without any definition supplied in that Specific Relief Act 1950, the other point of reference for consideration is the Rules of the High Court 1980, of which under O 1 r 4(2) it reads:

> (2) In these rules, unless the context otherwise requires, 'Court' means the High *Court* or any one or more judges thereof, whether sitting in Court or in Chambers, or *the Registrar*; O 32 r 9 ... the authority and jurisdiction of the Registrar is defined and regulated. (Emphasis added.)

[13] In a gist court also means a Registrar. As regards the jurisdiction of the latter, O 32 r 9 of the Rules of the High Court 1980, reads:

> The Registrar shall have power to transact all such business and exercise all such authority and jurisdiction as under the Act or these may be transacted and exercised by a judge in chambers except such business, authority and jurisdiction as the chief justice may from time to time direct to be transacted or exercised by a judge in person or as may by any of these rules be expressly directed to be transacted or exercised by a judge in person.

[14] In brief, this provision provides for the jurisdiction of the registrar, which expression includes the senior assistant registrar and the timbalan pendaftar. It empowers this person with powers of a judge in chambers as provided for under the Courts of Judicature Act 1964, or under any rules of the Rules of the High Court 1980, except for those matters directed by the Chief Justice or legislated by the same Rules of the High Court 1980, which must be heard by a judge in person (see *Mallal's Supreme Court Practice* (2nd Ed, 1983 Reissue); *Hwang Ju-in v Huang Han Chao* [1977] 2 MLJ 229 (CA); *Chan Sang & Anor v Golden Century Development Sdn Bhd & Anor* [1995] 1 MLJ 92; *Lau Yeok Lin & Ors v Hip Soon Engineering & Construction Sdn Bhd* [1988] 2 MLJ 308). Needless to say, where any written law requires that a judge in person hears and deals with a case, then the jurisdiction of the registrar is ousted (s 44 of the Specific Relief Act).

[15] As the term 'court also includes the registrar, let alone there being no evidence of any directions by the Chief Justice that a judge in person hears such declaratory decrees, the Registrar thus statutorily and legally has the jurisdiction to decide on such matters. I arrived at that conclusion after I had gone through the 'Arahan Amalan, Pekeliling Serta Surat-Surat Penting Yang Di keluarkan Oleh Badan Kehakiman sejak 1946 Yang Telah DiPutuskan Untuk Dikekalkan Semasa Mesyuarat Jawatankuasa Bertindak (Task Force)' from Pekeliling Pendaftar 22/46 – Arahan Amalan 1/2001 (altogether 91 directions) and 'Arahan Amalan (Practice Directions) Dan Arahan Ketua Hakim Negara Termasuk Indeks 1994 – 1999 Jilid 111' (altogether 31 directions). In fact I also failed to find the circular, law or instruction from the Chief Justice that prevented the senior assistant registrar from adjudicating and meting out a default of defence judgment for declaratory matters. These conclusions were also confirmed by the defendant's counsel.

[16] I now proceed to identify the provision the plaintiff will have to allude to, in the event he wants to obtain a default of defence judgment. The answer comes in the form of O 19 r 7 of the Rules of the High Court 1980, and it reads:

> 7 Default of defence: Other claims (O 19 r 7)
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> (1) Where the plaintiff makes against a defendant or defendants a claim of description then if the defendant fails or fail to serve a defence on the plaintiff, the plaintiff may, after the expiration of the period fixed by or under these rules for service of the defence, apply to the court for judgment, and on hearing of the application the court shall give such judgment as the plaintiff appears entitled to on his statement of claim.'

[17] That default of defence judgment application must be made before a court, with its terminology adequately defined under O 1 r 4(2) of the Rules of the High Court 1980. This issue as regards its meaning has been adequately discussed above. Putting all the pieces together, especially O 32 r 9 RHC 1980

and s 41 of the Specific Relief Act 1950 together with the abovementioned definition, an application to obtain that default judgment may be undertaken in chambers and heard by the Registrar. In fact in practice in this country, such applications are indeed heard by the senior assistant registrar or the timbalan pendaftar in chambers, as actually carried out in this case. On that premise again I was unable to conclude that a mistake had been committed by the registrar here for want of jurisdiction, regardless of this case being in the form of a writ summons and not an originating summons.

[18] To side track slightly, as an analogy I would like to advert to actions under O 81 of the Rules of the High Court 1980, which deals, amongst others with specific performance matters. Needless to say, for matters of specific performance it has always been accepted that only the High Court judge in person has that jurisdiction, and certainly not the registrar. In the event no defence has been filed by the defendant under this action the plaintiff may apply to the court for judgment. This provision provides for a procedure similar to an O 14 application (summary judgment), without the plaintiff having to proceed with a full blown trial, if all the preconditions are satisfied. On the other hand under O 73 r 5 no summary application may be made against the Government pursuant to an O 81 r 1 action (or O 14 r 1). Interestingly enough O 73 r 5 is silent as regards declaratory matters taken up against the Government.

[19] Even though an action under O 81 has to be dealt with by a High Court judge in person, a consent judgment may yet be made and recorded by the registrar where the Government is not involved. In fact the registrar may make an order if the defendant is in default of appearance, or does not attend at the hearing of the summons, or there clearly is no defence.

[20] *Mallal's Supreme Court Practice* (2nd Ed), pertaining to the above mentioned O 81, at p 1145 had occasion to author that:

> The summons goes in the first instance to the registrar who may make the order if it is *consented* to by all the parties or where:
>
> (i) …
>
> (ii) the defendant is in *default of appearance* or does not attend at the hearing of the summons or there is clearly *no defence.* (Emphasis added.)

[21] For argument sake, let us say this current case does not involve the Government, surely by analogy, if a registrar is permitted to record a consent judgment, or give an order for want of appearance, attendance, or defence in such an action, pertaining to matters normally dealt with by the High Court judge in person in an O 81 application, why then can the registrar not also record a default of defence judgment in a declaratory matter? Without any provision that is quite similar to O 73 r 5, which rules out any default of defence judgment against the Government, and no direction in existence

having been made by the Chief Justice directing only a High Court judge in person hears declaratory matters, that analogy thus will be equally applicable here. Sauce for the goose is also for the gender.

[22] Returning to the mainstream, it is a truism that most practitioners prefer to have permissible cases be heard by registrars first and then later moving on to the judge-in-chambers. Order 56 of the Rules of the High Court 1980 expressly states that there is a right of appeal to a judge-in-chambers from any judgment or order made by a registrar. Therefore if a High Court judge were to hear those cases at the outset any aggrieved party would lose one platform of appeal as he would be deprived of the processes of O 56. As a judge also deals with that appeal by way of an actual rehearing of the application, the aggrieved party would thus be entitled to two bites at the proverbial cherry (*Evans v Bartiam* [1937] AC 473).

[23] I now thenceforth focus on the practical aspect of this appeal ie whether the appeal filed by the defendant was in order or otherwise. In numerical terms two applications were heard by the registrar, namely encls 3 and 5, but yet the submissions of the defendant only made mention of one notice of appeal ie the one filed on 29 May 2002 (encl 6A). Factually speaking a second notice of appeal was filed on 9 October 2003 (encl 12), but on further scrutiny it was obvious why it was never adverted to. One solitary reason was sufficient to make that notice of appeal (enclosure 12) flawed. It was out of time. No leave either had been obtained to extend time for that notice of appeal for purposes of putting matters right. As the defendant had abandoned that second notice I likewise will not make mention of it anymore.

[24] I now touch on the very first notice of appeal ie encl 6A. Again, the comedy of errors continued with this surviving notice of appeal, similar to encl 12, which was left unsigned by the senior assistant registrar even though space had been accorded for him. To make matters worse, even a casual scrutiny revealed that the defendant had not stated its dissatisfaction of the rejection of encl 5. In other words the notice of appeal, even if it were not procedurally and documentarily flawed, merely appealed against the judgment emanating from encl 3, and not of 5. I herewith reproduce verbatim the impugned notice of appeal (encl 6A):

NOTIS RAYUAN KEPADA HAKIM DALAM KAMAR

Ambil perhatian bahawa defendan yang dinamakan di atas bercadang hendak merayu terhadap keputusan pendaftar yang bertarikh pada 23 Mei 2002 memerintahkan bahawa plaintiff:

(a) diberi kebenaran untuk mencatatkan penghakiman menurut A 19 k 7 Kaedah-Kaedah Mahkamah Tinggi 1980 terhadap defendan untuk tuntutan plaintiff di dalam perenggan 10(1), (ii) dan (iv) Pernyataan Tuntutan bertarikh 9 Ogos, 2001; dan

(b) kos permohonan ini ditanggung oleh defendant.

A Bertarikh pada 27 Mei 2002

Peguamcara defendan

[25] To regurgitate, perusing the above notice of appeal, no mention was made of the rejection of the application for an extention of time, so as to B permit it time to file the defence. That being so there was no necessity for me to touch on the reasons for the rejection of encl 5. I have to assume that the defendant was not dissatisfied with the latter's rejection, as confirmed by that silence in the above encl 6A, or by the non-filing of a separate notice of appeal.

C **[26]** Last but not least, in this appeal inundated by flaws, at the outset it was alleged by the plaintiff that it had yet to be served with a copy of the sealed notice of appeal (encl 6A). Any sealed copy must carry the signature of the registrar, the date when it was signed, the date of the hearing before the judge-in-chambers, and invariably the familiar seal (naturally all these to be preceded D by the filing fees). When all these identifying marks are on that document, then only can it be said it had been processed, sealed and ready for extraction. Thereafter that sealed copy after extraction must be served on the respondent. Even though I did not pursue this preliminary matter strenuously, as both parties had appeared contend to deal with the appeal E from the aspect of the want of jurisdiction of the registrar, evidentially I had found no sealed copy of a notice of appeal in the file. As encl 6A was certainly without those four (4) identifying marks inclusive of the seal, it was thus still a mere draft notice of appeal when service was done on the plaintiff on 29 May 2002 at 3.45pm Being persuaded by parties to approach the matter from the registrar's jurisdictional aspect I had thus refrained from taking the easy F way out, by not making much of the litany of errors.

[27] Based on all the above reasons I had no hesitation in rejecting the appeal with costs.

Appeal dismissed.

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Reported by Lim Lee Na

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